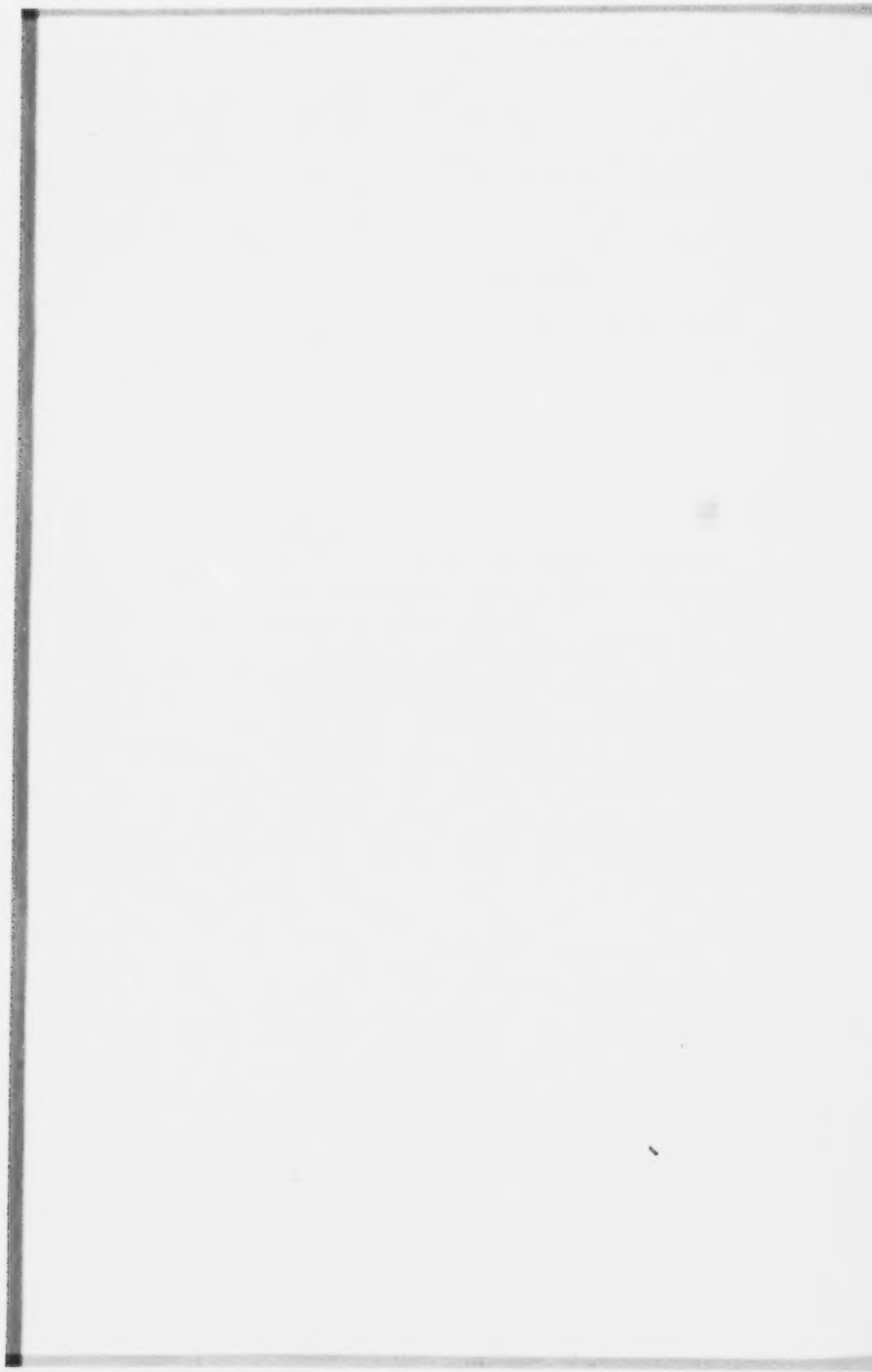

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Supreme Court of the United States

October Term.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Plaintiff,

against

INTERBOROUGH RAPID TRANSIT COMPANY,
Defendant.

CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee,
Plaintiff,

against

MANHATTAN RAILWAY COMPANY, *et al.*,
Defendants.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, *et al.*,
Plaintiffs,

against

INTERBOROUGH RAPID TRANSIT COMPANY, *et al.*,
Defendants.

SOLOMON G. SALOMON, for himself,
Appellant,

against

VAN S. MERLE-SMITH, *et al.*, J. P. MORGAN, *et al.* and J. HERBERT CASE, *et al.*, Contracting Committees, THE CITY OF NEW YORK, the TRANSIT COMMISSION and all other parties to Plan and Agreement to end the receivership of Interborough and Manhattan Companies, THOMAS E. MURRAY, as Interborough Receiver, and WILLIAM ROBERTS, Receiver of Manhattan Railway Company,
Appellees.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

SOLOMON G. SALOMON, *pro se,*
18 Pine Street,
Woodmere, N. Y.

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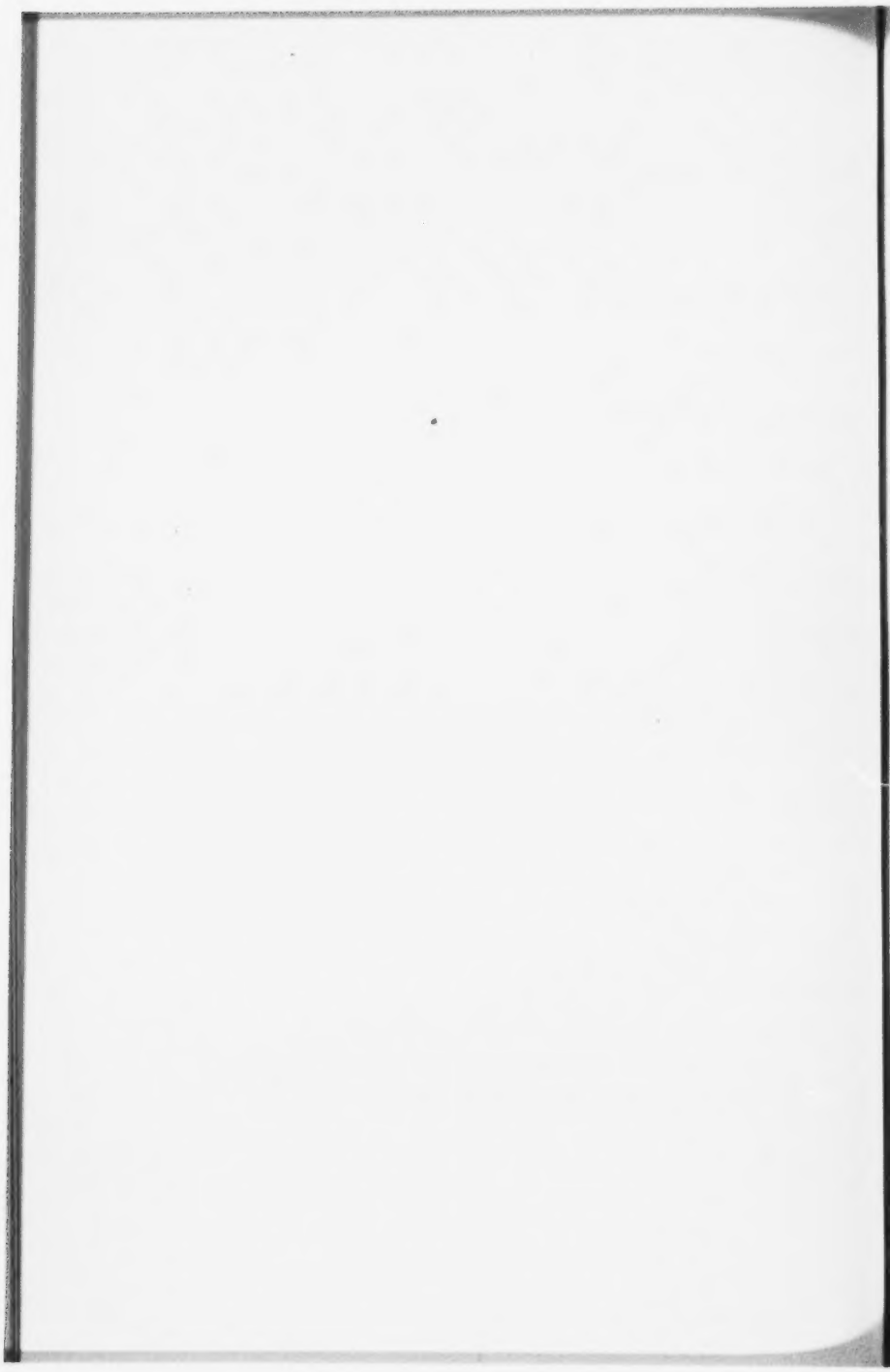

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

I, Solomon G. Salomon, respectfully petition for a writ of certiorari to review the opinion and decision No. 317—

October Term—1940 (pp. 2003-17)—of the United States Circuit Court of Appeals for the Second Circuit, entered as its final decree and filed September 23, 1941, (hereinafter called Opinion 317). Therein the Circuit Court adversely disposed of my appeals from the preparatory decree of Judge Robert P. Patterson, Circuit Judge, acting as District Judge in the District Court for the Southern District of New York, entered March 15, 1940, wherein he recorded that he believed a certain Plan and Agreement to be fair, equitable and timely; and from Judge Patterson's orders entered on June 12, 1940, confirming and converting into final orders, certain other preparatory decrees, issued for the purpose of preparing the way for said decree of March 15, 1940; and from his finishing order, ordering that said Plan and Agreement be effectuated, because fair, equitable and feasible.

The various preparatory decrees, in the chronological order of issuance, are:

1—The decree of foreclosure and sale of certain Manhattan Railway Property, December 11, 1939, (R., Vol. I, pp. 187-241);

2—The decree of foreclosure and sale of certain Interborough Rapid Transit Property, February 5, 1940, (R., Vol. II, p. 525);

3—The decree dated March 15, 1940, (a), declaring the amount of $18,000,000 represents a fair compromise of the claims and counter-claims set forth in a document called "Analysis etc.", (R., Vol. II, p. 919, item (70)), and fixing said amount to be due to Manhattan and its security holders from Interborough Rapid Transit Company and

holders of its securities; and (b), declaring said $18,000,000 should be diverted and constitute a "Settlement Fund" for distribution, pro rata, to non-assenting holders of Manhattan securities of the designated kinds, in the respective amounts set forth in the Order dated March 15, 1940, (R., Vol. I, pp. 410-18), in the event that the Plan and Agreement should be effectuated according to the provisions of Article Two (2) and Article Five (3) thereof;

4—The decree declaring the Plan and Agreement dated March 15, 1940, (R., Vol. I, p. 419), to be fair, equitable and timely.

The final orders issued on June 12, 1940 are:

A—The order confirming the preparatory sale in the receivership, of certain Manhattan-owned assets to Merle-Smith, *et al.*, (R., Vol. I, pp. 241-71); for the purpose of transferring title to same to the City, and the transfer thereof to the City, (R., Vol. II, pp. 536-61);

B—The order confirming the preparatory sale in the receivership, of certain Interborough-owned assets to J. P. Morgan, *et al.*, (R., Vol. I, pp. 273-304); and the transfer thereof to the City, (R., Vol. II, pp. 524-35);

C—The Order Authorizing and Directing Consummation of the "Interborough-Manhattan Unification Plan", (R., Vol. II, pp. 456-523).

Statement of Facts

The facts, in barest outline, are:

A

The City of New York offered to purchase majorities of ⅔ or more of the shares of Manhattan Railway

Company's capital stock and Second Mortgage bonds and 76% or more of its Consolidated Mortgage bonds, (hereinafter called First Mortgage), same being the only classes of outstanding securities of said Company; and to purchase 76% each of Interborough bonds and 7% notes but not any of the Interborough capital stock or 6% notes, (the only other existing classes of Interborough securities), because, *prima facie,* the latter two were worthless in the existing circumstances of the Interborough Estate; *i.e.*— the Estate being legally bound to keep the Manhattan lease, and legally bound to furnish the existing service of through transportation at 5¢, even to the exhaustion of the investments of the co-adventurers Interborough bondholders, as well as of the investments of the holders of its stock and 6% notes, (*Murray* v. *Roberts,* 103 F. 2d. 889, 893).

B

The City, through its authorized officials, made said offer in Section II, Article Seven of the Plan and Agreement, (*supra*), on August 31, 1939. The Committees, and the representatives of the Rockefeller Interests, all of whom signed the verbose published Plan and Agreement, (R., Vol. I, pp. 60-155), (hereinafter called Plan), bound themselves to continue to represent the respective classes of securities in the Receivership Proceedings, if the City actually acquired the ownership of the amounts of said five classes of securities set forth above, or more, (which it did on November 22, 1939, see Exhibit A, Vol. I, pp. 385-87). This continued representation furnished the City many mouths in the Receivership Proceedings, whereas

lawfully it had only two, the Corporation Counsel and the Special Counsel for the Transit Commission. Through these mouths and the mouths of the then Assenting Committees, (and later the mouths of assenters who signed after August 31, 1939), many self-serving words were spoken. This plethora of words served to obscure the few simple and proper words uttered by Mr. Gutman and myself on March 6, 1940, wherein we expressed the apparent objections to, and the objectionable features of, the Plan. Same appear on pages 879-887, in Volume II of the Record on Appeal.

C

The Opinion in *Manhattan Ry. Co.* v. *Central Hanover Bank & T. Co.*, (99 F. 2d 789), shows I appeared therein, and that I was already calling Section 24 of the Rapid Transit Act of this State to the attention of the Federal Courts and all Manhattan parties admitted to intervention in the receivership. Thereby, I showed them Interborough Receivers could not ever have any lawful right to disaffirm the Manhattan lease, because Interborough's franchises to operate its elevated railroad routes, were granted under Section 24 of said Act, and same is "the law of the case" of disaffirmance.

I asked to be heard at that time under the principle expressed in Rule 24 (a)—(2) and (3) of the Federal Rules of Civil Procedure. I did not rely on Section 24-a of the Rapid Transit Act which relates to "Relocation of a railroad or portion thereof", as mis-stated in the opinion therein.

The Opinion, in 99 F. 2d. 789, merely held that some day there would be a decision which would determine the

existence or non-existence of any right to disaffirm the Manhattan lease. The effect of applying "the law of the case" would have been an automatic determination that the District Court had no right to allow a partial foreclosure of the Manhattan First Mortgage in 1938. Now, the District Court has presumed to ignore "the law of the case" and to permit a complete and final foreclosure of the mortgage, for the sole purpose of effectuating this Plan, (Article Two (2) thereof), rather than make good or compensate the results of its own errors. Absent said errors, there could not be any such foreclosure. It is clear that, in 1938, the Circuit Court avoided prompt determination of the two most important matters involved in the receivership, contrary to the established principles of justice, which were incorporated in the second sentence of Rule 1 of the Federal Rules of Civil Procedure, submitted to Congress before January 17, 1938 and thereupon duly approved and given the force of law.

D

Following the Opinion of Judge Patterson, dated June 16, 1938, (R., Vol. II, p. 937, item (151)), in an effort to obtain just, speedy, and inexpensive determination of the disaffirmance matter, as it should be determined pursuant to Section 24 of the Rapid Transit Act, I petitioned, via Manhattan Receiver, for reargument, (R., Vol. II, p. 938, item (152)). The petition sets forth that, if there had been an application to disaffirm the March 15, 1913 Agreement between Manhattan and Interborough, and to disaffirm the certificate for the additional tracks, (often called Third Track Certificate), the ensuing briefs and

arguments would have revealed that disaffirmance of the Manhattan lease could not be allowed because Interborough was, in fact, tied to the Manhattan lines by other instruments in addition to the Manhattan lease, (see division *"Second"*, item (151), *supra*).

The petition also sets forth that the March 15th Agreement, the Third Track Certificate and the Extension Certificate constituted an integral transaction. In *Murray* v. *Roberts*, (103 F. 2d, 889, 894), the Circuit Court decided that the Third Track Certificate and the Extension Certificate are indissolubly united. In the same Opinion, (p. 897), the Circuit Court decided that Mr. Murray must continue to keep possession of the tracks authorized by the Third Track Certificate and must exploit them sufficiently to comply with the Certificate.

On page 20 of my main brief below, I said:

> "Judge Patterson did not hold that the language of Section 24, paragraph 3 of the Rapid Transit Act, hereinbefore quoted under FUNDAMENTAL FACTS, is obscure or that, because of context, any other meaning can be given to said language than that Interborough was bound to operate such spans on a Manhattan-owned line and the original line as a unit. Neither has this Court so held."

And this Court said in *Edwards* v. *Kearzey*, (96 U. S. 595, 601), "the laws which subsist at the time and place of making a contract enter into it and form a part of it, as if they were expressly referred to or incorporated in its terms". Judge Patterson himself could have decided, long before April 17, 1939, that he had been in error, thus avoiding about $7,100 costs to the Interborough Estate and

enormous allowances to attorneys and others for argument of a matter which, in good faith and good sense, could have been summarily disposed of at any time during the receivership without bleeding the Estate.

E

The Circuit Court did not deny the correctness of the meaning I attribute to Section 24, paragraph 3 of the Rapid Transit Act, quoted in FUNDAMENTAL FACTS,—*i.e.*, the provision which provides that the grantee of such franchises would construct an extension of, or any additional tracks on the supporting structure of, its lines, (as the case might be), with like effect as though the same were part of the original route of the line to which added.

It failed to consider or reject the evidence in Interborough Receivers' Application No. 17, (R., Vol. II, p. 927, item (135)), and Manhattan Receiver's Application No. 5, (R., Vol. II, p. 928, item (136)), showing that the issue of right to disaffirm the Manhattan lease arose and was joined at the outset of the receivership.

The Circuit Court ignored the fact that the natural product of "the law of the case" in Section 24, paragraph 3, if applied to said Applications of the three Receivers, was, (and is), the possibility for Judge Manton to have summarily disposed of the disingenuous asserted right to disaffirm the Manhattan lease, except that thereby, he would have deprived "eminent counsel" of the pap they thrive on.

F

The Circuit Court ignored: (1)—the three "Fundamental Factors" set forth on pages 28-33 of my main brief

below; (2)—the reference to Judge Manton and the successive attorneys appointed by him as Counsels to Receivers Dowling and Murray (Main Brief, p. 17); and, (3)—the reference to the possibility of purposeful bungling of the administration of the Interborough Estate, and of the trusteeship of the solvent Manhattan Company's affairs, by Judge Manton and his Receivers, (Main Brief, p. 34); and failed to consider whether the imputed bungling was culpable neglect, regardless of whether designed or careless.

G

The Circuit Court chose to ignore my substantiated allegations in totum and to believe the untrue items, (numbered 1-19), categorically enumerated in my Reply Brief, and duly corrected therein; including the misstatement of the Law of New York on which Respondents relied and rely to show the Plan was legal, even if not just.

H

The Circuit Court chose to ascribe unsubstantiated wisdom to their associate, Judge Patterson, and to disparage my ability to understand, (Opinion 317, p. 2017), though they were compelled to agree with my view of the Third Track Certificate, in *Murray* v. *Roberts,* (*supra*), set forth in Manhattan Receiver's Application No. 33, (*supra*), although same was rejected by Judge Patterson, (R., Vol. II, p. 938, item (152a)). The Court ignored the fact that the difficulty of managing the receivership did not lessen the duty to apply to the management the laws governing the conduct of the receivership. Further-

more, they ignored the fact that the difficulty of receivership management is not the criterion of the validity of the Plan purported to have been conceived and executed under the special legislation misquoted by the Respondents; and they ignored that the devisers of the scheme submitted it to the Judge who had evidently misconceived his task in the premises (R., Vol. II, pp. 879-82),—*i.e.*, the duty to remain impartial and to apply the laws and rules, as they exist.

I

In Opinion 317 (p. 2017), the Circuit Court alleged or confessed it did not apprehend the nature and meaning of my appeal. I, therefore, duly petitioned for a rehearing as set forth in the copy of the petition hereinafter. The Circuit Court refused to allow themselves to be informed and insisted on abiding by their uninformed judgment evidenced by Opinion 317. Said fact is evidenced by the Mandate filed on September 23, 1941 in accordance with the Opinion.

The petition for rehearing was, (and is), the following:

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 317—OCTOBER TERM, 1940.

(Argued May 22, 1941 Decided August 12, 1941)

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Plaintiff,

vs.

INTERBOROUGH RAPID TRANSIT COMPANY,
Defendant.

CENTRAL HANOVER BANK AND TRUST COMPANY,
as Trustee,
Plaintiff,

vs.

MANHATTAN RAILWAY COMPANY, *et al.*,
Defendants.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, *et al.*,
Plaintiffs,

vs.

INTERBOROUGH RAPID TRANSIT COMPANY, *et al.*,
Defendants.

PETITION

To the Honorables, Judges Swan, Augustus N. Hand and Clark, Circuit Judges:

Undersigned petitioner, for the purpose of demonstrating that it is fitting and proper that your Honors allow and

order a rehearing of his appeal, decided by you on August 12, 1941, respectfully shows:

I

That you said (p. 2006):

> "As the receivership dragged on it became clear that the solution of many of the problems arising between Interborough and Manhattan and their respective security holders, depended on a solution of the question of the right of Interborough's receiver to disaffirm the burdensome Manhattan lease."

This statement, unfortunately, evidences the fundamental misconceptions that: (a) time was needed for perceiving that such was the case, and (b) the "question" of the right to disaffirm could not have been promptly or summarily disposed of.

Actually, said "problems" and the dependency of their solution upon solution of the "question" of right to disaffirm the lease were clear and apparent at the very outset of the receivership. The bill of complaint by American Brake Shoe and Foundry Company and Manhattan's petition for extension of the receivership to itself, accomplish this. In March of 1933, Interborough receivers' Application No. 17 and Manhattan receiver's Application No. 5 re-emphasized all said matters.

Relying on these facts and the decisions of this Court in the matter of disaffirmance, petitioner raised the issue of wrongdoing by Judge Manton and the Interborough receivers in (1), neglecting to protect Manhattan, its creditors and stockholders; (2), delaying solution of said "problems" particularly the "problems" of righteousness of creating defaults on the Manhattan mortgages and not curing the defaults; and (3), delaying solution of the "problems" of whether all items of rentals under the Manhattan lease

should be defrayed and paid by the Interborough estate. Petitioner, likewise, raised the issue that the succeeding judges continued in said errors.

Relying on the facts (1), that it is an elementary proposition of law that no fraction of a railroad route may be abandoned without the consent of the grantor of the franchise; (2), that surrender of Manhattan owned lines would constitute abandonment of fractions of Interborough's routes, despite resistance by the State and City to noncompliance with the Interborough franchises; and (3), that the provisions of paragraph 3, Section 24 of the Rapid Transit Act of this State must be read into Interborough's franchises as if fully set forth therein, this petitioner raised the issue that the "question" of right to disaffirm the lease was actually and visibly untenable, throughout the receivership.

Relying on all the said facts, the petitioner also raised the following issues:

(1) That the foreclosure of the Manhattan mortgage was based on the errors of the Court which allowed the foreclosure and that the foreclosure was unfair.

(2) That the with-holding of rentals due Manhattan and petitioner was based on said errors and was unfair.

(3) That allowing any offset to Manhattan's claims against Interborough, in favor of Interborough for its claims against Manhattan, was necessarily predicated on said erroneous premise of right to disaffirm the lease, and that imposing any such allowance was unfair.

Petitioner raised other issues including that of restoration by Interborough bondholders of over $70,000,000 improperly paid.

The above issues were presented for decision as necessary prerequisites needed for the correct determination as to the fairness of the Plan in question. These issues do not constitute reargument of the disaffirmance issue. Your Honors stated correctly that the latter was "the question of the right of Interborough's receiver to disaffirm the burdensome lease." The decision of this Court entered April 17, 1939, is that there was no such right. Petitioner, relying on said decision and the holdings in *Murray* v. *Roberts,* seeks to test the fairness of the plan by determination of said issues in the aforesaid manner.

II

That you said (p. 2006),

> ". . . on April 17, 1939 an opinion was handed down holding that because of certain franchise obligations to the City the lease could not be disaffirmed unless, as a result of negotiations with the City, these obligations could be performed by some means other than affirmance. This decision established the City's strategic position in the affairs of the companies . . .".

This statement confirms that this Court solved said "question" of right to disaffirm, by answering it in the negative but, unfortunately, the statement evidences additional fundamental misconceptions of the case.

Said negotiations were not to be with the City alone. They were to be "with Manhattan and with the City" (*Murray* v. *Roberts,* 103 F. (2d) 889, 897-8). Consequently the City could not have been established alone in said "strategic position in the affairs of the Companies".

Manhattan, consequently, was established in strategic position and was entitled to the benefits thereof. Said bene-

fits were, (1), that of being solvent, rightfully, at the time of the Plan; (2), that of being entitled to restoration and replenishment of the value of its property, under the lease; (3), that of having successfully disproved the validity of Interborough's claims against Manhattan by reason of an affirmed lease; and, (4), that of having successfully established the priority of Manhattan rentals over payments to Interborough bondholders and 7% noteholders and the right to recover in respect to said $70,000,000.

Petitioner raised a number of issues growing out of the decision (*Murray* v. *Roberts*) that there was no right to disaffirm the Manhattan lease. These issues do not "constitute in substance a reargument of the disaffirmance issue" (opinion August 12, 1941, p. 2017), but are issues that should be decided because prerequisite to a correct determination of whether this Plan is fair to Manhattan, its senior bondholders, its Second Mortgage bondholders and the holders of its guaranteed stock. Petitioner having the three classes of securities, under the affirmed lease, is in the strategic position that rental alone, due him to July 1, 1940 totaled $56 per share besides being a creditor and shareholder.

Judge Patterson was clear in stating, on June 16, 1938 that if there was no right to disaffirm the Manhattan lease, "Manhattan bondholders and stockholders with unmodified stock will receive payment in full at the expense of other Interborough creditors" (item 151, R. p. 937—page 10395 of Receivership Record).

Judge Patterson wrongfully ignored this Court's Mandate to enforce its decision of April 1939 to do justice and proceed to enforce the decision and its consequences.

Therefore, *petitioner raised the issue that this was wrongful to Manhattan and petitioners and others similarly situated as well as to this Court.* This issue does not "constitute in substance a reargument of the disaffirmance issue but grows out of the decision of April 17, 1939. Others

may sell or otherwise dispose of their rights—but they may not properly dispose of Manhattan Company's rights or force petitioner and others similarly situated to enter into their agreements. Certainly these issues should be determined and are needed for a correct decision of whether this plan is fair to Manhattan, petitioner and others similarly situated.

Petitioner respectfully submits that because of the matters hereinabove set forth it is fitting and proper that there be a rehearing of his appeal herein.

WHEREFORE petitioner prays your Honors to grant and order a rehearing of his said appeal.

Dated August 26, 1941.

SOLOMON G. SALOMON
pro se
18 Pine Street
Woodmere, New York.

The foregoing petition is true and not made for the purpose of delay and I believe it is well founded in point of law.

.....
SOLOMON G. SALOMON

JURISDICTION

The judgment of the Circuit Court of Appeals was entered September 23, 1941. The jurisdiction of the Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

This petition for writ of certiorari for review by Your Honors is the result of the Circuit Court's action of having ignored and failed to consider the matters involved in my appeal to them.

QUESTIONS PRESENTED

The matters to be considered in connection with this petition are:

1st. Whether, for the proper purposes of law and equity, the offer of the City to purchase ⅔ or more of the Manhattan capital stock was converted into an executed contract between the depositing holders thereof and the City on November 22, 1939; and whether it was necessary, under Section 124 of the "Unification Statute", for the security holders or the City to seek the approval of the Court in respect to their contract.

2nd. Whether the City was authorized by law to pay $12,096,160 in its interest-bearing "promises to pay" for 600,000 shares of Manhattan stock if the company were insolvent in the bankruptcy sense.

3rd. Whether the Manhattan Company was solvent in the bankruptcy sense vis-a-vis its First Mortgage bondholders under the following circumstances.

The City actually paid to Merle-Smith, et al., for title to Manhattan properties, purportedly acquired via foreclosure, $27,152,750 in "promises to pay" for transfer of said title. The mortgage was secured by pledge of all income from and product of liquidation of the property pledged. Therefore, by adding together the $18,000,000

purported compromise allowance, the $6,400,000 distributable cash under the Plan, the $2,033,500 received on account of interest to January 1, 1939, and about $1,000,000 (3% interest on $33,552,750 from July, 1939 to June 12, 1940), and said $27,152,750, it becomes apparent that about $54,586,250 of assets were available to pay principal and interest of about $42,920,000 due on Manhattan First Mortgage bonds. Consequently, a surplus of about $11,666,000 should have been available to be returned to the Company.

4th. Whether the said $11,666,000 rendered the Manhattan Company solvent and made possible the payments in full of about $5,704,508 principal and interest due on Second Mortgage bonds payable June 12, 1940; leaving a visible residue of about $4,960,000 available for distribution to the stockholders, in addition to other recoverable amounts due Manhattan Company.

5th. Whether the Rapid Transit Act, Section 24, paragraph 3, precluded the possibility of disaffirmance of the Manhattan lease at all times prior to June 12, 1949.

6th. Whether, possibility of disaffirmance being precluded, the $42,894,000 claim of Interborough Receiver against Manhattan Company for improvements under the Extension and Third Track Certificates was, in fact, untenable under the March 15th, 1913 Agreement and every other agreement between Interborough and Manhattan.

7th. Whether the $42,894,000, being an untenable claim, could be used to offset the tenable claims arising out of the affirmed lease so as to reduce the tenable claims to $18,000,000.

8th. Whether the foreclosure of the Manhattan Mortgage was based solely on errors committed by the Court and is, therefore, invalid in law and equity, and consequently, is not a due process of law for the transfer of title of Manhattan property to the City.

9th. Whether, as a matter of law, the City was authorized to acquire title to Manhattan properties via the processes provided in the provision of the "Unification Statute", (set forth in my Reply Brief on pages 7 and 8): and forbidden to acquire title by any other method.

10th. Whether the Plan and Agreement is feasible as a matter of law.

11th. Whether the decision of the Circuit Court was based on an informed judgment.

12th. Whether the receiverships were or could be terminated by reason of transfer of part of the receivership assets to the City, and whether my duly demanded determination of the invalidity of the interim payments in respect to the Interborough bonds and 7% notes can properly be refused.

13th. Whether, Judge Patterson negligently or purposely held, in his Disaffirmance Opinion of June 16, 1939, (filed June 18th) that,

> "No outright covenant to operate the Manhattan lines either alone or along with the extensions for any definite time can be found in the Extension Certificate."

since as a matter of fact the Extension Certificate provides, that,

> "The authorization or licenses hereby granted . . . shall be held by the Interborough Company for a period of eighty-five (85) years from the date on which the Interborough Company shall first begin operation of any part of any of the (Extensions) Railroads, unless sooner terminated as hereinafter provided."

and, whether he violated the principle enunciated in *Edwards* v. *Kearzey*, (*supra*, in division D of Statements of Fact), by neglecting to read Section 24, paragraph 3 of the Rapid Transit Act into the Extension Certificate, repeatedly quoted by me in my Main Brief, (below), which provisions provide that an extension constructed, will have been constructed by the grantee of the franchise,

> "with like effect as though the same had been a part of the original route of . . . its railroad then in actual operation . . . ."

14th. Whether, in its decision in 99 F. 2d 789, (*supra*, divisions C and D), the Circuit Court violated Rule 1 of the Federal Rules of Civil Procedure, referred to in said divisions C and D.

15th. Whether, the Circuit Court by failing to definitely decide the Manhattan lease must be affirmed, glossed over Judge Patterson's evident misconception of Interborough's obligations under the Extension Certificate, set forth in 13th, (*supra*); caused confusion in the minds of the unaware; and encouraged Mr. Murray to disingenuously petition this Honorable Court, on November 27, 1939, during

its October Term, 1938, (No. 552), for writ of certiorari, for the purpose of delaying enforcement of the Mandate in *Murray* v. *Roberts, (supra)*, hoping the Plan here in question would, in the vernacular, be "put over" without the holders of Manhattan securities becoming aware of the actualities.

On the same day or shortly thereafter, Manhattan Receiver Roberts filed cross-petition, (same Term), No. 558. But he joined with others, in the motion made on or about December 14, 1939, (opposed by Counsel for Harold Palmer, *et al.*, on behalf of holders of Manhattan 7% Guaranteed Stock), thus aiding in the said "putting over" of the Plan.

In order to enable this Court to form a correct estimate of the real intent of the petition and cross-petition, I incorporate the latter herein, by reference. Said cross-petition, same Term, was numbered No. 558, copy annexed hereto, (Appendix A). I except from said incorporation herein, the limitations as to not asking this Court to consider the substance of the petition unless Mr. Murray's contentions are considered by Your Honors. I also except from the statement from page 4 thereof,

> "the opinion of the District Court contains a comprehensive statement of the facts in the case . . ."

and the statement on pages 4 and 5 thereof, to wit:

> "The elevated operations were carried on pursuant to four principal instruments . . . (4) 'Third Track Certificate' granted to Manhattan Railway Company on March 19, 1913, for the construction and operation of third tracks on the Second Avenue, Third Avenue and Ninth Avenue Elevated Lines . . ."

I reject the latter two statements because, (see my Main Brief, pp. 14 and 20), the Court of Appeals of the State of New York held, in *City of New York* v. *Interborough Rapid Transit Co.*, that on March 19, 1913, the Extension Certificate was issued to Interborough and that,

> "On the same day an instrument known as the additional track certificate was issued to Interborough", (257 N. Y. 20, 30).

The Circuit Court in *Murray* v. *Roberts*, (*supra*, p. 894), referring to the Joint Trackage Agreement, the Extension Certificate and the Third Track Certificate, said,

> ". . . if Contract No. 3 is a part of a single franchise with the three, it is not important whether that franchise is 'mandatory' or not, for the Interborough cannot surrender one part and keep the rest, . . . But that we need not decide, because the Court of Appeals in *New York* v. *Interborough Rapid Transit Co.* (257 N. Y. 20) has decided it for us."

Your Honors will, no doubt, consider whether the decision of the Court of Appeals as to whom the Third Track Certificates was issued, is equally binding on the Circuit Court, Judge Patterson and all parties to the proceedings in *Murray* v. *Roberts* (*supra*) as the decision last cited, hereinabove.

16th. Whether, (a), my appeals involved fundamental matters on which the validity of Manheim's contentions depended and depend; (b), whether the decision of Manheim's contentions can possibly constitute a consideration of the fundamental matters involved in my appeal; and

(c), whether, contrary-wise, it was requisite to carefully pass on the matters involved in my appeals, in order to decide the validity of Manheim's contentions and whether the Plan was feasible under the existing circumstances of the Receivership and under the "Unification Statute".

17th. Whether, if the Circuit Court had not been prejudiced in favor of their associate Judge Patterson (Opinion 317, last paragraph), the Circuit Court would have had any color of excuse to utter the "obiter dictum" contained in the first sentence of said last paragraph; and because of such twaddle, to allow itself to ignore my contention; and, whether, absent such prejudice, my contentions can be grasped even through the crass fraud revealed by my statement of the case, may have caused the Circuit Court to gasp, and say, like the man, who on seeing the giraffe in the zoo said, "I don't believe there is any such animal".

In connection with the matter of fraud, I would call Your Honors attention to the principle voiced by the Court of Appeals of the State of New York, in *Warren* v. *Union Bank of Rochester,* (157 N. Y. 259, 271), wherein said Court cited with approval the following passage from *Warner* v. *Blakeman,* (4 Keyes 487), which reads:

> "It is the just and proper pride of our matured system of equity jurisprudence that fraud vitiates every transaction; and however men may surround it with forms, solemn instruments, proceedings conforming to all details required in the laws, or even by the formal judgment of courts, a court of equity will disregard them all, if necessary, that justice and equity may prevail."

Your Honors, no doubt, will find said citation to be a correct statement of principle, applicable not only in cases arising in District Courts in the State of New York, but in all cases over which the Federal Courts have jurisdiction.

18th. Whether the Circuit Court negligently or purposely accepted and incorporated into its statement of facts, (1), the averred schedule of deposits of securities on November 22, 1939, stated by Respondents, on page 25 of their answering brief below; (2), did not notice that 27.55% of 43,500 shares of Manhattan 7% Guaranteed Stock and 63.27% of 556,500 shares of Manhattan Modified Guaranteed Stock represents about 364,085 shares or less than ⅔ of 600,000 shares of Manhattan Capital Stock and incorporated the mis-statement in their Opinion 317; and thereupon negligently or purposely ignored that, (3) the evidence on pages 385-87, Volume I of the Record on Appeal, shows that 400,675 or over ⅔ had been deposited on said day; (4) overlooked Respondents' misstatement of Section 123-2 of the "Unification Statute", revealed on pages 7 and 8 of my Reply Brief below; (5), exercised an uninformed judgment, by ignoring the necessary actual fact and the natural results of the actual occurrences; (6), on such basis presumed to determine that the Respondents' version of the matters involved in my appeal should be accepted, and my actually proven averments rejected; and (7) finally presumed to affirm the Plan as feasible whereas it was effectuated by methods contrary to the Mandate of the law, set forth in said eloquently omitted provision of the law.

19th. Whether:

1—The petition in which I joined in December, 1932, (copy annexed hereto, marked Appendix B), was correct

and prophetic of things to come in the Interborough Receivership;

2—Said petition should have been granted;

3—The policy of excluding participation by discerning individuals, having actual investments, was continued by Judge Patterson, (as evidenced by Mr. Roberts' Allegation 1 in the introductory averment to my petition annexed to his Application No. 33, *supra*, Statement of Facts, D and H), and remained unchanged during the regime of Robert P. Patterson, as Judge in charge of the Interborough Receivership;

4—The memorandum, (copy annexed hereto, marked Exhibit C), submitted by Robert E. Connolley, Esq., to Judge Patterson, in support of the application of certain parties asking leave to intervene in the Interborough Receivership proceedings, particularly the matter of the Plan, under Rule 24(a) of the Federal Rules of Civil Procedure, was improperly denied by Mr. Patterson;

5—The failure to grant the petition supported by said memorandum evidences the fact that Mr. Patterson was determined to accomplish his own purposes, regardless of the Federal Rules of Civil Procedure Nos. 1 and 24 (a), and whether same eloquently pleads the correctness of the note in Yale Law Journal, Vol. 47, page 746, (March 1938), and subsequent quotations cited in Mr. Connolley's memorandum are applicable to the Interborough Receivership, and showed the "Conclusion" of the memorandum should not have been denied.

20th. Whether the application made by Interborough Receivers, (Application No. 17), March 14, 1933, for time

in which to make formal application to disaffirm the Manhattan lease, and the grant thereof by Judge Manton, constituted misfeasance by both of them, because they must be deemed to have had knowledge of all the matters set forth under the heading FUNDAMENTAL FACTORS, on pages 28-33 of my Main Brief.

21st. Whether Judge Manton, who had been convicted of selling justice at the time of the hearing of my appeal below, could by himself have committed the act of misfeasance or nonfeasance hereinbefore referred to in division C of the Statement of Facts, if the judges associated with him in such cases had not been negligent.

22nd. Whether the administration of the receivership was corruptly and/or negligently in favor of the controlling bankers.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred in failing to find:

1—Title to Manhattan-owned property could not be lawfully conveyed to the City of New York by the foreclosure method provided in Article Two (2) of the Plan, because Manhattan Railway Company was lawfully and justly solvent; the defaults in respect to its mortgages were errors of the District Court and its Receivers; and the Court was in duty bound to cure same, particularly when it was duly asked to do so on November 27, 1939 (R., Vol. II, pp. 594-6), on March 31, 1933 in Manhattan Receiver's Application No. 5 and on numerous other occasions;

2—"The law of the case", in respect to disaffirmance of the Manhattan lease was and is Section 24 of the Rapid Transit Act; the Mandate of said law, that the elevated routes must be operated as if they were original routes; and, consequently, Interborough Receivers could not possibly have had any right to disaffirm the lease up to and including June 12, 1940;

3—The City after obtaining control of the ⅔ majority of Manhattan stock, on November 22, 1939, could not lawfully disaffirm the Manhattan lease, but was in duty bound to proceed to the dissolution of the Company and to ascertainment of non-assenting security holders' rights in and to their company's belongings, according to the provision to that effect in Section 123 of the "Unification Statute";

4—The City after obtaining control of Interborough Rapid Transit Company and Manhattan Railway Company, on November 22, 1939, did not have lawful or equitable right to dissolve the two companies except by lawfully paying out the duly determined worth of non-assenting minority interests, if any, in and to the respective belongings of the respective companies (*Consolidated Rock Products Co.* v. *DuBois*, 85 L. ed. 603);

5—The Plan was unfair because of all the reasons set forth by Appellant on pages 8-11 inclusive of his Main Brief below, and because of the errors and facts set forth on pages 6 and 7 of said brief, in paragraphs marked A, B, C, D, E;

6—The Plan and methods employed by the District Court and the Respondents amount to attempted coercion of Appellant and others similarly situated, and is in law and equity a fraud upon Appellant and others similarly situated;

7—The Receivership Estate was unnecessarily burdened with hundreds of thousands of dollars by way of expenses and fees because of the raising of disingenuous claims and unnecessary litigation such as the formula proceedings and other special proceedings; all of which could have been avoided by the summary dismissal of the Interborough Receivers' averred rights to disaffirm the Manhattan lease;

8—The Plan was an unlawful and wrongful Plan designed to perpetuate and not correct the wrongful administration of the Receivership Estate and the acts of misfeasance and nonfeasance of the Receivers and the District Court.

REASONS FOR GRANTING THE WRIT

Rule 1 of the Federal Rules of Civil Procedure, particularly the second sentence thereof, shows the ever-recurrent tendency of the Statutory Courts to disregard the very essence of justice, to wit: the determination of controversies submitted to a Court, with all possible speed, and at as small expense as possible in the particular case. The just, speedy and inexpensive determination of causes is therefore, rightfully, the first rule imposed on all District Courts alike.

In the present instance, the said principle was violated by the dilatory practices commencing in and before Inter-

borough Receivers' Application No. 17 was filed on March 14, 1933. The issue, though joined on March 31, 1933, did not come to trial until November 1937, notwithstanding the facts of the Rapid Transit Act. The violation flared up again in the instance of the issuance of the Mandate of the Circuit Court, filed July 25, 1939, reversing Judge Patterson's idea that a right existed to disaffirm the Manhattan lease. The Mandate commanded that there be further proceedings according to law, justice and the laws of the United States. Judge Patterson, on July 27, 1939, adopted the Mandate and thereby ordered Receiver Murray to obtain means other than the Manhattan lease to enable him to fulfill the franchise obligations Interborough had undertaken on March 19, 1913, or to affirm the lease. The next day, July 28, 1939, he thumbed his nose at the law and the Mandate by suspending any action thereunder, expecting to help "put over" the Plan and "duck" his duty to correct the errors of the Receivers which he had adopted on June 16, 1938. He brushed aside the request that he obey the Mandate, made on November 27, 1939 (R., Vol. II, pp. 594-6), when it had become evident that the officers and directors displaced by the Manhattan Receiver, and the Manhattan Receiver, would do nothing in the premises.

Judge Patterson's stubborn bias in favor of the Interborough Bankers' interests in the Interborough bonds and 7% notes is evidenced by his advocacy of the cause of the Interborough bondholders and 7% note holders recorded at pages 879-83 of the Record on Appeal herein, even when confronted with the clear holding in *Murray* v. *Roberts* that these bond and note holders were coadventurers with the stockholders, because their investments are also devoted to performing the obligations of the 1913 franchises and

contracts, since their monies were loaned after March 19, 1913. The rationale of said holding confirmed the contention (allegation 9) in Manhattan Receiver's Application No. 5, March 31, 1933, alleging Manhattan and the holders of its guaranteed 7% stock were and are operating creditors of the Interborough System.

Judge Patterson's determination to nevertheless deprive me, and others who refused to be bullied, of our rights, is wholly inexcusable. The example or precedent which might become unjustly established for many years, as *Swift* v. *Tyson* was, should be wiped out by a no uncertain condemnation by this Honorable Court. It is, I submit, a matter of the gravest public concern that the just laws embodied in our Constitution and other proper statutes shall not be violated by the Courts, whose first duty is to abide by same and enforce the laws, and the principles of equity.

Even if it should be thought that the Interborough Receivership may be the last of the important Equity Receiverships, it should be impressed upon the Statutory Courts that the principles underlying Equity Receiverships must be applied where liquidations are involved, as is the case in the present instance.

Furthermore, the Statutory Courts should learn once and for always that the law governing reorganizations is based on the very principles violated in this receivership. The decision below to end the receivership without any determination of priorities, though same was duly asked, should be condemned by this Court.

There are many reasons which will, no doubt, occur to this Court itself, why it should review the matter of the feasibility of the Plan. However, I respectfully submit,

the unconscionable disregard of the fact that the "Unification Statute", or any similar state legislation, could not supersede the laws and rules laid down in the Constitution and statutes governing methods and proceedings in receiverships, ~~and~~ should be made so clear that no Judge, in the future, will presume to be a law unto himself; and no Circuit Court will presume, in the future, to "duck" the questions and matters plainly involved and set forth in an appeal from the decision of a District Court or administrative body.

CONCLUSION

Wherefore, petitioner respectfully prays that his petition be granted.

Respectfully submitted,

SOLOMON G. SALOMON,
pro se,
18 Pine Street,
Woodmere, N. Y.

EXHIBIT A

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM ROBERTS, Receiver of Manhattan Railway Company, *Petitioner,* *against* THOMAS E. MURRAY, as Receiver; INTERBOROUGH RAPID TRANSIT COMPANY; J. P. MORGAN and others as Committee; GUARANTY TRUST COMPANY OF NEW YORK as Trustee; J. HERBERT CASE and others as Committee; NORMAN JOHNSON and others as Committee; DWIGHT F. FAULKNER, JR., and others as Committee; BANKERS TRUST COMPANY as Trustee; THE CITY OF NEW YORK and TRANSIT COMMISSION, *Respondents.*	No. , October Term, 1939

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Your petitioner, William Roberts, as Receiver of Manhattan Railway Company, prays that, in the event this Honorable Court grants the petition for writ of certiorari in the cause of Thomas E. Murray as Receiver of Interborough Rapid Transit Company *et al.* against The City of New York, Transit Commission, William Roberts as Receiver *et al.*, which petitioner is informed and believes

will be filed with this Court on or about November 27, 1939 to review a judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above cause on June 7, 1939, petitioner be also granted a writ of certiorari to review said judgment to the end that if this cause is to be reviewed by this Court, all the questions which were before the Circuit Court of Appeals will also be before this Court.

Petitioner believes that the decision of the Circuit Court of Appeals in this cause is not of a character to warrant review by this Honorable Court under the principles followed in its consideration of applications for certiorari. He intends to oppose any application for writ of certiorari which may be filed in behalf of the Receiver of the Interborough Rapid Transit Company or other Interborough parties. In the event, however, that despite your petitioner's opposition a writ of certiorari should be granted upon the application of said Receiver or other parties, your petitioner desires that the review by this Court of the decision of the Circuit Court of Appeals for the Second Circuit embrace all of the questions which were before that Court. Certain issues were decided by the Circuit Court of Appeals adversely to the contentions of your petitioner and it is possible that if these issues had been decided in favor of petitioner, the judgment of the Circuit Court of Appeals would have been different from that which was rendered. In these circumstances, petitioner is advised that it may be doubtful whether such issues would properly be before this Court in the absence of a cross-petition for writ of certiorari filed on his behalf, and in accordance with the practice recognized in *Stelos Co.* v.

Hosiery Corp., 295 U. S. 237, 238, 239, files this cross-petition for certiorari.

OPINIONS BELOW

The opinion of the District Court of the United States for the Southern District of New York (R. Vol. III, pp. 1471-1508) is not as yet officially reported. The opinion of the Circuit Court of Appeals for the Second Circuit (R. Vol. VI, pp. 3045-3059) is officially reported in 103 F. (2d) 889.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. The judgment of the Circuit Court of Appeals was entered June 7, 1939 (R. Vol. VI, p. 3131). Petitions for rehearing were duly presented by Thomas E. Murray, as Receiver of Interborough Rapid Transit Company and by Guaranty Trust Company of New York, as Trustee of the Interborough First and Refunding Mortgage on May 12, 1939 (R. Vol. VI, pp. 3060-3128) and were denied on June 2, 1939 (R. Vol. VI, pp. 3129, 3130). Leave to file a second petition for rehearing was granted to said parties on June 13, 1939 (R. Vol. VI, p. 3131). This second petition for rehearing was filed by them on June 21, 1939 (R. Vol. VI, pp. 3132-3152), and was denied on June 28, 1939 (R. Vol. VI, p. 3153). On September 21, 1939, Honorable Stanley Reed, an Associate Justice of this Court, granted your petitioner an extension of time within which to file a cross-petition for writ of certiorari to November 27, 1939 (R. Vol. VI, p. 3156). This application is therefore in due time. *Gypsy Oil Co.* v. *Escoe*, 275 U. S. 498.

QUESTION PRESENTED

Whether the Interborough Receiver must retain possession of the Manhattan Railroad in order to perform his obligations to the City of New York.

STATEMENT

The opinion of the District Court contains a comprehensive statement of the facts in the case (R. Vol. III, pp. 1471-1508) which it is difficult, if not impossible, to condense. The opinion of the Circuit Court of Appeals adopted the facts as stated by the District Court and presupposed familiarity with them (R. Vol. VI, p. 3046).

The issues in the courts below turned upon the construction and effect to be given to certain instruments and contracts entered into by the Interborough Rapid Transit Company which provided for the operation by that Company of a system of subway and elevated railroads in the City of New York.

The following summary statement is believed sufficient to introduce the questions raised by this cross petition.

The Interborough Company operated the subways under three contracts with the City of New York, known as Contracts Nos. 1, 2 and 3, the last mentioned contract having been entered into on March 19, 1913 (R. R. Ex.,* Vol. I, pp. 279-430; *id.*, Vol. III, pp. 1011-2252).

The elevated operations were carried on pursuant to four principal instruments: (1) A lease made by Manhattan

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*This notation refers to the three volumes of so-called Receivership Record Exhibits which were incorporated into the record by stipulation of counsel and order of court (R. Vol. VI, pp. 3037, 3038).

Railway Company to Interborough Rapid Transit Company, dated January 1, 1903, for a term of 999 years from November 1, 1875, of substantially all of the property of Manhattan Railway Company, including the Second Avenue, Third Avenue, Sixth Avenue and Ninth Avenue Elevated Lines (R. R. Ex., Vol. I, pp. 431-482);* (2) "Extensions Certificate" granted by Public Service Commission of the State of New York on March 19, 1913 authorizing Interborough to construct and operate four extensions to the property leased from Manhattan Railway Company, which connected Manhattan Elevated Lines with the subways constructed and operated under Contracts Nos. 1 and 3 (R. R. Ex., Vol. II, pp. 505-571); (3) "Joint Trackage Agreement" entered into on March 19, 1913, which prescribed the terms under which the Interborough, as the lessee of the Manhattan Railway Company and as grantee of the Extensions Certificate, should have trackage rights over certain sections of the subway tracks constructed under Contract No. 3 (R. R. Ex., Vol. II, pp. 651-666); (4) "Third Track Certificate" granted to Manhattan Railway Company on March 19, 1913, for the construction and operation of third tracks on the Second Avenue, Third Avenue and Ninth Avenue Elevated Lines (R. R. Ex., Vol. II, pp. 585-637), the obligations of which were assumed by Interborough by agreement with Manhattan Railway Company, dated March 15, 1913 (R. R. Ex. Vol. I, pp. 489-498), the Public Service Commission of the State of New

*The rental under this lease was reduced by the consent of a large percentage of Manhattan Railway Company stockholders pursuant to a Readjustment Plan of 1922; R. R. Ex., Vol. II, pp. 713-760.

York consenting to the assignment to Interborough of the rights of Manhattan Railway Company under this certificate by order dated March 20, 1913 (R. R. Ex., Vol. III, pp. 2253-2263).

The relationship between Contract No. 3, relating primarily to subway operations, and the Extensions Certificate relating primarily to elevated operations, was authoritatively determined by the New York Court of Appeals in *City of New York* v. *Interborough Rapid Transit Company*, 257 N. Y. 20, where the Court said (p. 36):

> "Although expressions of the detailed purposes of these instruments are incorporated in separate documents, they were executed on the same day and are so interlocked and combined in their common scheme, so inextricably interwoven, that each must be regarded only as part of an integral transaction."

The Court also referred to specific provisions in Contract No. 3 and the Extensions Certificate as demonstrating "the intermingling of the subject-matter of the two instruments and the extent of the contemplated union in operation of the elevated and subway systems".

Two other contracts should also be mentioned: By Agreement of July 16, 1903 (R. R. Ex., Vol. I, pp. 465-482) Contract No. 1 was amended so as to provide a connection between the Third Avenue Elevated near 149th Street and the Contract No. 1 subway line and to permit through trains to operate over the subway and over this connection and over the Manhattan Leased Line. By Agreement of June 7, 1906 (R. R. Ex., Vol. I, pp. 483-488) passengers riding north upon the Manhattan Line south of 149th Street were afforded the right to continue their trip on the Contract No. 1 Line without the payment of addi-

tional fare and conversely passengers on the subway line were afforded the right to continue south on the Manhattan Line without the payment of additional fare.

Receivers were appointed for Interborough Rapid Transit Company on a general creditor's bill on August 26, 1932 (R. Vol. I, p. 1). Manhattan Railway Company intervened in the receivership and petitioner was appointed Receiver of Manhattan on September 6, 1932. On March 31, 1933, petitioner, as Manhattan Receiver, filed his Application No. 5 for an order adjudging that the Interborough Receivers were without authority to disaffirm the Manhattan Lease and directing the Interborough Receivers to pay all items of Manhattan rental (R. Vol. I, pp. 14-33). On February 1, 1934, the Interborough Receivers filed their Application No. 52 for leave to disaffirm the Manhattan Lease (R. Vol. I, pp. 179-272). On March 28, 1934, the City of New York and the Transit Commission filed separate petitions in the receivership cause for leave to sue the Receivers of Interborough and Manhattan in the State court, to the end that an adjudication might be had in the State court of the extent of Interborough's obligations to the City of New York under the instruments above referred to (R. Vol. I, p. 8). This application was denied on January 10, 1935 (10 F. Supp. 512), which decision was affirmed by the Circuit Court of Appeals upon the opinion below (76 F. (2d) 1002); and certiorari was denied on June 3, 1935 (295 U. S. 760). In October, 1937, the Interborough Receiver filed applications for leave to disaffirm the Extensions Certificate (R. Vol. II, pp. 665-675), the Joint Trackage Agreement (*id.*, pp. 701-702) and the Agreement of June 7, 1906 (*id.*, pp. 653-658). Petitioner, as Manhattan Receiver, filed

Application No. 26, supplementing his Application No. 5, for an order directing the Interborough Receiver to affirm the Manhattan Lease (*id.*, pp. 740-752). The City of New York and the Transit Commission filed petitions alleging, among other things, that the loss of possession of the properties and trackage rights over the railroads leased by Manhattan Railway Company to Interborough Rapid Transit Company would incapacitate the Interborough Receiver to perform its obligations under the 1913 transaction and the June 7, 1906 Agreement (R., Vol. I, p. 8; Vol. II, pp. 618-626, at pp. 624, 625). On June 18, 1938, the District Court filed an opinion, in substance, granting Interborough Receiver's Application No. 52 to disaffirm the Manhattan Lease, but providing for a stay of the operation of the order until appeal could be heard in the Circuit Court of Appeals. It denied Interborough Receiver's applications to disaffirm the Extensions Certificate, the Joint Trackage Agreement and the Agreement of June 7, 1906 but held that the obligations of the Agreement of June 7, 1906 could be satisfied by the establishment of a free transfer point at 149th Street and Third Avenue for passengers entitled to its benefits (*id.*, Vol. III, pp. 1507-1508, 1510-1514). The District Court denied Manhattan Receiver's Applications Nos. 5 and 26 and denied the petitions of the City of New York and Transit Commission, except in so far as they had been granted by the refusal of the Court to grant Interborough Receiver's applications to disaffirm the Extensions Certificate, the Joint Trackage Agreement and the Agreement of June 7, 1906 (*id.*, Vol. III, p. 1514).

The Circuit Court of Appeals affirmed the decision of the District Court in so far as it required the Interborough

Receiver to perform the obligations of the Extensions Certificate and the Joint Trackage Agreement, and held that these obligations could not be performed without retention of possession of the Manhattan third tracks. The Circuit Court of Appeals further held that the Manhattan Third Track Certificate was indissolubly linked with the Extensions Certificate as a part of the franchise obtained by the Interborough from the City of New York on March 19, 1913. The Circuit Court of Appeals did not attempt to settle the order but made a general statement as to the instructions which should be given to the Interborough Receiver. This statement is as follows (R. Vol. VI, p. 3058):

> "It is impossible definitively to settle the terms of the order now, but the receiver's instructions should in general be as follows. He must continue to keep possession of all tracks which are authorized under the 'Third Track Certificate', and he must exploit them sufficiently to protect the certificate against forfeiture for nonfeasance. He must operate through trains over the 'Extensions' and joint tracks, and this will almost certainly make it desirable to continue them over the third tracks as well. (We do not at present decide whether if it is not desirable to do so, he must nevertheless give such through service.) He must accept northbound passengers free upon the 'West Farms Extension', whatever their destination (except so far as by agreement transfers are substituted). As possessor of the Manhattan third track on Third Avenue he must similarly accept southbound passengers free. He will reject the Manhattan lease if he is able to perform the foregoing obligations to the City by any other means than affirmance of it; but if after negotiations with the Manhattan and with the City no other

> means is possible than affirmance of the lease, he must affirm the lease."

Proceedings before the District Court to settle the order in accordance with this decision have been held in abeyance due to an agreement which has been entered into by Committees representing security holders of Interborough Rapid Transit Company and Manhattan Railway Company for sale of the properties of both companies to the City of New York (the so-called Unification Plan).

In reaching its decision, the Circuit Court of Appeals rejected certain contentions made by petitioner, which, if accepted, would necessarily have affected the instructions to be given to the Interborough Receiver.

One of these contentions is based upon Article VI of the Extensions Certificate. This Article is as follows (R. R. Ex., Vol. II, pp. 521, 522):

> "The Interborough Company shall be entitled to charge for a single fare for each passenger for one continuous trip in the same general direction over the Railroads (including the parts of the municipal railroad over which the Interborough Company is provided with trackage rights as in this certificate provided) and the additional tracks (which shall mean the additional tracks authorized by the Commission by certificate to the Manhattan Railway Company bearing even date herewith) and the Manhattan Railroad the sum of five (5) cents but not more. A trip from any point on the Queensboro Bridge Line (including the part of the municipal railroad over which trackage rights are provided) to any point on the Manhattan Railroad or on the Railroads, or a trip from any point on the Manhattan Railroad or on the Railroads to any point on the

Queensboro Bridge Line (including the part of the municipal railroad over which trackage rights are provided) shall be deemed a continuous trip in the same general direction."

In explanation of this Article it may be said that the word "Railroads" is defined as meaning the extensions authorized by the Extensions Certificate. The "parts of the municipal railroad over which the Interborough Company is provided with trackage rights" are the parts of the subways constructed under Contract No. 3 and extending for long distances in the Bronx and in Queens. The "additional tracks" are those referred to in the Third Track Certificate and the "Manhattan Railroad" refers to the property, rights and franchises leased to the Interborough by the lease of January 1, 1903 (R. R. Ex., Vol. III, p. 508). In explanation of the second sentence of the Article it may be said that the "Queensboro Bridge Line" is merely a connection between the Manhattan Second Avenue Elevated and the subway tracks constructed under Contract No. 3 in Queens. The connection diverges from the Second Avenue Elevated Line at right angles and the obvious purpose of this second sentence is merely to make certain that it would never be contended that a trip over the Queensboro Bridge was not "in the same general direction" as the Second Avenue Elevated Line.

It was petitioner's contention in the courts below that it was necessary for the Interborough Receiver to retain possession of the Manhattan Railroad in order to perform the covenant contained in Article VI to charge five cents but not more for a trip over the Manhattan Railroad, the extensions and the joint tracks. The District Court and the Circuit Court of Appeals rejected this contention, holding,

in substance, that the Article merely fixed the rate of fare, if the ride was given, but that the Article imposed no obligation upon the Interborough Company or upon its Receiver to give the ride.

Article IX of the Extensions Certificate (R. R. Ex., Vol. II, pp. 524-526) obligates the Interborough "to operate over such parts [joint tracks] in conjunction with the Railroads [the extensions] to the end that through service may be provided over such parts over the Railroads and over the Manhattan Railroad". This Article, as well as Article VI, was referred to by the New York Court of Appeals in its opinion (257 N. Y. 20, 36) as demonstrating the contemplated union in operation of the elevated and subway systems. Petitioner contended in the courts below that this covenant could not be performed by the Interborough Receiver without retention of possession of the Manhattan Railroad. The courts below rejected this contention.

Article XII of the Extensions Certificate (R. R. Ex., Vol. II, pp. 537-546) provided in minute detail how the net profits to be derived from the Manhattan Railroad, the additional tracks and the extensions were to be divided between the City of New York and Interborough; and established the order in which the Interborough was to be permitted to make deductions from the gross revenues of the Company Lines as defined in the Article. This Article provided that the taxes incurred in the operation of the Company Lines and rentals necessarily payable for the Manhattan Railroad should be deducted from the gross revenues before even the deduction of operating expenses. Petitioner contended that this order of deductions safeguarded the integrity of the Interborough-Manhattan system and should have been observed by the Interborough

Receiver with the necessary effect that he would retain possession of the Manhattan Railroad. This contention was rejected by the courts below.

SPECIFICATIONS OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the Receiver of the Interborough Rapid Transit Company might, upon the conditions set forth in the Circuit Court of Appeals' opinion, disaffirm the existing lease of Manhattan Railway Company's properties.

2. In failing to hold that the Interborough Receiver was bound by the terms of the Extensions Certificate to retain possession of the Manhattan Railroad so as to afford through service over the Joint Tracks, Extensions and said Railroad at a five-cent fare.

3. In failing to hold that the Interborough Receiver was bound by the terms of the Extensions Certificate and particularly Article XII thereof to pay the rentals due under the Manhattan Lease out of the gross revenues as defined in the Article before deducting operating expenses from said gross revenues.

REASONS FOR GRANTING THE WRIT

1. This Court should have the entire case before it in the event that the petition for writ of certiorari filed on behalf of other parties is granted.

2. The Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with the applicable local decisions.

1. It would be manifestly desirable, if a writ of certiorari should be granted at the request of the Interborough Receiver, that the entire case be brought before this Court. As above pointed out, it was the contention of the Manhattan Receiver that the Interborough Receiver was not only obligated to retain possession of the third tracks in order to perform Interborough's franchise obligations to the City of New York as held by the Circuit Court of Appeals but was also obligated to retain possession of the entire Manhattan Railroad. Since, however, if petitioner's argument with respect to the effect of Articles VI, IX and XII of the Extensions Certificate, or any of them, is accepted, the effect would be to change the form of relief authorized by the Circuit Court of Appeals in a way which might be considered to be more favorable to petitioner than that granted, petitioner believes that there is substantial doubt as to whether he would have a legal right to present such arguments to this Court on any review of the decision of the Circuit Court of Appeals if this cross-petition for certiorari were not made. For this reason alone, if this Court should grant the petition for a writ of certiorari made by other parties, it is submitted that the writ prayed for in this petition should also be granted.

2. It is plain that Articles VI and IX of the Extensions Certificate were inserted in the Extensions Certificate so as to assure to the traveling public a through ride for five

cents, not only over the extensions and joint tracks, but also over the Manhattan Railroad and the third tracks. They were the provisions of the Certificate which the New York Court of Appeals relied on as demonstrating "the contemplated union in operation of the elevated and subway systems." *City of New York* v. *Interborough Rapid Transit Co.*, 257 N. Y. 20, 36.

It is submitted that the decision of the Circuit Court of Appeals that Article VI of the Extensions Certificate did not require the Interborough Receiver to retain possession of the Manhattan Railroad is inconsistent with the New York law. *People ex rel. W. S. St. Railway Co.* v. *Barnard*, 110 N. Y. 548; *Beekman* v. *Third Avenue Railway Company*, 153 N. Y. 144. Both of these cases hold, it is submitted, that where in a franchise for an extension to a main line there is a condition as to the rate of fare to be charged for a ride not only over the extension but also over the main line, the owner of the franchise for the extension must give the ride over the main line as well as over the extension.

In the courts below, the Interborough Receiver attempted to distinguish the *Barnard* case on the ground that the resolution of the common council (110 N. Y., p. 554) contained the language that "passengers should be carried", which do not appear in Article VI of the Extensions Certificate. The attempted distinction is without merit because the Court of Appeals held (*id.*, p. 553) that no condition could be imposed unless it were inserted in the notice of sale; and the notice of sale (*id.*, p. 555) did not contain the phrase above quoted but provided simply that the company "shall charge no greater than a five-cent fare for one continuous passage" on the route described, which included

both the main line and the extension. The language of the Court of Appeals (*id.*, p. 557) that "the resolution undoubtedly required the railway company taking the grant to carry passengers to and from points beyond one of its termini" therefore means that the language of the resolution and that of the notice of sale were regarded as synonymous, since, if the language of the resolution were deemed in conflict with that of the notice of sale, the latter, not the former, would have controlled. The Interborough Receiver also asserted that the proceedings in the lower courts show that the question here referred to was not presented in the case, but it is submitted that examination of the record on appeal shows that it was.

In the *Beekman* case, the court considered the effect of Section 93 of the Railroad Law (now Section 173) providing that a franchise for an extension must contain a provision that "but one fare shall be exacted for passage over such branch or extension and over the line of road which shall have applied therefor". The Court held (153 N. Y., p. 161): "The obvious meaning of the statute, is, that in such cases the public should be entitled to passage from point to point over or upon the branches and the main line for a single fare."

Here the question is not whether the fare clause in and of itself imposed an obligation upon the Interborough to operate over the Manhattan Lines. The Interborough Receiver for reasons given by the District Court and the Circuit Court of Appeals is obligated to operate over the extensions and joint tracks; and Article VI requires him, in connection with such operation, to give passengers a ride for five cents over the Manhattan Lines as well.

Under the above authorities, the express covenant contained in Article VI of the Extensions Certificate, means that a passenger is entitled to ride over the Manhattan Railroad as well as over the third tracks and over the extensions and joint tracks. The Interborough Receiver cannot give to passengers the type of ride agreed to be given to them by Article VI unless he retains possession of the Manhattan Railroad. Possession of the third tracks is not sufficient as many passengers have their destinations at local stations on the local tracks and under Article VI would be entitled to be carried to their destinations on the local tracks as well as to express stations on the third tracks.

In *City of New York* v. *Interborough Rapid Transit Company*, 257 N. Y. 20, at p. 27, the Court of Appeals referred to the numerous conferences which had been held among members of the Public Service Commission and of the Board of Estimate and Apportionment with Interborough preceding the execution of the instruments of March 19, 1913, and said (p. 27), "that among the dominant features of those conferences was the proposed use of all the existing rapid transit lines with such of the contemplated lines as were designed to connect with them on the basis of a universal five-cent fare". Such purpose, it is submitted, was carried out by Articles VI, IX and XII of the Extensions Certificate, as well as by the Third Track Certificate.

CONCLUSION

WHEREFORE petitioner respectfully prays that this cross-petition be granted in the event that the petition for writ of certiorari in *Thomas E. Murray, as Receiver of Interborough Rapid Transit Company* v. *The City of New York, The Transit Commission, William Roberts, as Receiver of Manhattan Railway Company, et al.*, is granted.

Respectfully submitted,

WILLIAM ROBERTS, as Receiver of Manhattan Railway Company, Petitioner,

by

CHARLES E. HUGHES, JR.,
ALLEN S. HUBBARD,
Counsel for Petitioner.

Doc. 98

EXHIBIT B

Petition of William Graves Smith, William L. White, E. R. Ritchie, Sol G. Salomon, Marcel H. Stieglitz and Kay Realty Co., Inc., For Leave to Intervene.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.	In Equity E 70-364

To the Judges of the District Court of the United States for the Southern District of New York:

The petition of WILLIAM GRAVES SMITH, WILLIAM L. WHITE, E. R. RITCHIE, SOL G. SALOMON, MARCEL H. STIEGLITZ and KAY REALTY CO., INC., on behalf of themselves and all others similarly situated, respectfully shows the Court and alleges:

1. Petitioners and members of the immediate families of individual petitioners and persons for whom individual petitioners are attorneys-in-fact, are severally the owners of stock and bonds of the Interborough Rapid Transit Company and Manhattan Railway Company of an aggregate par value of $1,088,000, as follows:

a. Interborough Rapid Transit Company First and Refunding 5% Gold Bonds of the par value of $54,000.

b. Interborough Rapid Transit Company Ten-Year 6% Gold Notes of the par value of $201,000.

c. Manhattan Railway Company 7% Guaranteed Stock of the par value of $56,000.

d. Manhattan Railway Company Modified Stock of the par value of $530,000.

e. Manhattan Railway Company Consolidated Mortgage 4% Bonds of the par value of $243,000.

f. Manhattan Railway Company Second Mortgage Bonds of the par value of $4,000.

2. Petitioner Kay Realty Co., Inc., is a corporation organized and existing under the laws of the State of New York and is a taxpayer of the City of New York. Its real property is assessed at an amount in excess of $1,000, and it has paid tax thereon within the last twelve months.

3. Individual petitioners are users of both subway and elevated lines now operated by the Interborough Rapid Transit Company, or its Receivers, in the City of New York.

4. On or about the 26th day of August, 1932, The American Brake Shoe and Foundry Company, the plaintiff herein, filed in this Court its Bill of Complaint against the Interborough Rapid Transit Company, defendant herein, as a general creditor, and thereupon Victor J. Dowling and Thomas E. Murray, Jr., of the City of New York, were by order of Hon. Martin T. Manton, United

States Circuit Judge designated to hold a District Court, appointed temporary receivers for Interborough Rapid Transit Company. On or about September 2, 1932, Manhattan Railway Company petitioned herein for the extension of the receivership and for the appointment of a separate receiver of itself and of its property. By an order dated September 6, 1932, Judge Manton appointed William Roberts of the City of New York temporary receiver for Manhattan Railway Company. By order dated September 28, 1932, Judge Manton continued Victor Dowling and Thomas E. Murray, Jr., as receivers for Interborough Rapid Transit Company and William Roberts as receiver for Manhattan Railway Company.

All documents filed in the above-entitled cause are hereby referred to and for that purpose, and, albeit without admitting the truth of any allegations of fact therein contained, the same are hereby incorporated herein and made a part of this petition.

5. Numerous questions of vital and far-reaching importance in so far as they affect the interests of the petitioners have been, and on information and belief will be, raised in the above-entitled cause and come before this Court for its decision therein. Your petitioners refer to the evidence already taken herein and to the allegations contained in documents filed herein and to oral and written arguments made herein, from all of which the interests of the petitioners, and persons similarily situated, are apparent.

6. Heretofore no persons have intervened herein to protect the interests of taxpayers of the City of New York, nor the interests of users of transit lines in the City of

New York. The City of New York itself has not been made a party, nor has it intervened or taken any steps or action herein, although urged to do so, and although its interest in the Interborough-Manhattan properties and their operation is far greater than that of all the security holders combined. The Transit Commission has not been made a party herein, nor has it intervened or taken any steps or action herein. The City of New York and its taxpayers and the users of transit lines in the City of New York, are interested in this action and in this receivership, among other reasons, because:

(1) The rights of the City of New York under the agreements referred to in the record herein as Contracts Nos. 1, 2 and 3 and Amendments and modifications thereof and under the Elevated Extension Certificate and the franchises of Interborough Rapid Transit Company are seriously involved in the matter of the adoption or rejection by the Interborough Receivers of the lease referred to in the record herein as the Manhattan Lease.

(2) The City of New York has an investment in the property in the hands of the receivers herein in excess of $150,000,000.

(3) There is claimed to be due and owing to the City of New York $1,500,000 on account of real estate and special franchise taxes.

(4) The right of users of rapid transit lines in the City of New York to a continuous trip in the same general direction over the lines of Interborough Rapid Transit Company and Manhattan Railway Company, at a single fare of five cents, and the right to a trip

wholly within the lines of Manhattan Railway Company at a five-cent fare are seriously involved and threatened in the matter of the adoption or rejection by the Interborough Receivers of the lease referred to in the record herein as the Manhattan Lease.

7. For some time past the officials of the Interborough Rapid Transit Company and of the Brooklyn-Manhattan Transit Company, which also operates rapid transit lines in the City of New York, have been conducting negotiations with representatives of the City government with respect to a sale of all the rapid transit lines to the City of New York, the City thereupon to operate a unified system. This proposed sale involved payments to each class of security of Interborough and Manhattan.

8. Petitioners believe that the best interest of all classes of Interborough and Manhattan security holders, taxpayers and riders is "unification"; that unification is most likely to be consummated by preservation of the integrity of the Interborough system as presently operated, and that unification may be retarded or prevented if the system disintegrates.

9. Petitioners believe that disaffirmance of the Manhattan Lease will give to the City of New York the right to declare a breach of Contracts Nos. 1 and 3 and the Elevated Extension Certificate. If this were done, security of the Interborough 5% Bonds would be jeopardized, and the position of Manhattan securities seriously impaired.

10. Committees have been formed to represent the separate interests of the various classes of securities held by

petitioners other than Manhattan Second Mortgage Bonds, and such committees, other than the committee for the Manhattan Modified Stock, have been permitted to intervene herein. Petitioners are not satisfied with such representation. Said committees are striving for what is believed to be the special interest of one class of security as opposed to the others. Representation should be given to a group interested not so much in such special interest, but in the common advantage to taxpayers, riders and security holders in the adoption of unification. The committees for the Interborough 5% bonds and 7% notes favor unification but are opposing the continuance of the integrity of the Interborough system.

11. Petitioners believe and allege that many persons, like them, are holders of not merely one class of Interborough or Manhattan securities, but of a number of classes, and are consequently more interested in a solution of the problem as a whole, rather than the special advantage of a particular security. Such persons should be given representation. The granting of this petition would effect that result.

12. At the present time the committee for Manhattan Modified Stock has not intervened herein. This is the class of security of which petitioners hold the largest amount. In so far as this part of their holdings is concerned petitioners are not represented at all by any intervener now in the suit.

13. Your petitioners allege that, in view of the importance to them of the questions which are now before

this Court and which will from time to time arise in this cause, they should be permitted to intervene in this cause.

WHEREFORE, your petitioners pray that an order be entered herein permitting your petitioners to intervene as a party defendant in this cause with the right to plead and to be heard on all matters arising in this cause, and that your petitioners be entitled to notice of all proceedings herein and for such other, further, different and additional relief as to this Court may seem just and proper. And your petitioners will ever pray.

Dated, New York, N. Y., December 19th, 1932.

WILLIAM GRAVES SMITH,
WILLIAM L. WHITE,
E. R. RITCHIE,
SOL G. SALOMON,
MARCEL H. STIEGLITZ,
KAY REALTY CO., INC.,

By M. S. REISMAN,
V-President.

SAMUEL UNTERMYER,
CHARLES DICKERMAN WILLIAMS,
Counsel.

IRA W. HIRSHFIELD,
Solicitor for Petitioner,
521 Fifth Avenue,
New York.

STATE OF NEW YORK,
COUNTY OF NEW YORK,
SOUTHERN DISTRICT OF NEW YORK, } ss.:

WILLIAM GRAVES SMITH, being duly sworn, deposes and says:

I am one of the petitioners herein. I have read the foregoing petition and the same is true to the best of my knowledge, information and belief.

WILLIAM GRAVES SMITH.

Sworn to before me this
19th day of December, 1932.

WILLIAM C. MORRIS,
Notary Public,
Kings County.
Kings Co. Clerk's No. 880, Register's No. 3505.
Cert. filed in N. Y. Co. Clk's No. 1149, Reg's No. 3M733.
Cert. filed in Westchester Co. Clerk's & Register's.
Commission expires March 30, 1933.

EXHIBIT C

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, *Complainant,* *against* INTERBOROUGH RAPID TRANSIT COMPANY, *Defendant.*	In Equity No. E 70-364
CENTRAL HANOVER BANK & TRUST COMPANY, as Trustee, *Plaintiff,* *against* MANHATTAN RAILWAY COMPANY, *et al.,* *Defendant.*	Consolidated Cause E 77-271
CENTRAL HANOVER BANK & TRUST COMPANY, as Trustee, *Plaintiff,* *against* MANHATTAN RAILWAY COMPANY, *et al.,* *Defendant.*	Accounting Action E 71-211

MEMORANDUM ON BEHALF OF SIDNEY WASSNER, *ET AL.*, COMMITTEE FOR MANHATTAN SECOND MORTGAGE BONDS, IN SUPPORT OF PETITION FOR LEAVE TO INTERVENE.

The petition to intervene alleges grounds for intervention of right under two clauses of Rule 24a of the Federal Rules of Civil Procedure. (1) The allegation with reference to the issue of affirmance by Interborough's Receiver of the Manhattan lease sets forth grounds for intervention under clause "2" of that rule; they, together with the history of these proceedings, with which the Court is already familiar, show that "the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action". (2) The allegations in paragraph "Eighth" of the petition as to the invalidity of the pledge of Interborough bonds to secure Interborough's 7% noteholders show grounds for intervention under clause "3" of that rule; they show that "the applicant is so situated as to be adversely affected by distribution or other disposition of property in the custody of the Court or an officer thereof", which distribution is imminent under the "Plan of Unification" which has heretofore been brought to the Court's attention.

The class represented by the petitioners is not a party to these proceedings and is not presently represented in them and has not been represented throughout the negotiations of the "Plan of Unification". It has at last become obvious that their interests have not been, and are not being, adequately represented by reason of the fact that the issue as to affirmance of the Manhattan lease has quite evidently been abandoned by the Trustee under the mortgage, the Manhattan Receiver, and the company itself, and by reason of the fact that all of these parties have agreed to, or not dissented from, the provision in the "Plan of Unification" allocating to these bondholders 50% of the face value of their bonds, which figure could be conscionable only on

the hypothesis that the lease must be disaffirmed. The neglect of petitioners' interest is also apparent from the fact that more than seven years have now elapsed without final disposition of these primary and fundamental issues in these proceedings, and nearly seven months have elapsed since the Circuit Court of Appeals rendered its decision which was tantamount to a direction that the lease be affirmed. Petitioners insist that they have the right, in view of the dereliction of the other parties, to either compel the affirmance of the lease, or in the alternative, to negotiate a modification of the terms of the "Plan of Unification" with the hypothesis of disaffirmance omitted.

Regardless of whether petitioners might have any standing to object in an isolated action to foreclose on the bonds pledged by Interborough to secure 7% notes, they certainly have such standing in the present situation where a lump sum price is to be paid for the assets in the receiverships and a mis-allocation of a part thereof based upon a mis-classification, is likely to be at the expense of the petitioners and, furthermore, as creditors of Interborough, petitioners have a right to prevent a dissipation of its assets to their detriment.

This application is timely. The issue of disaffirmance is still before the Court and the issue as to the validity of the bonds may still be contested in the foreclosure action. The fact that the receivership has been in existence for over seven years has no bearing whatever on the question of timeliness. The petitioners do not seek to attack any of the decrees or proceedings heretofore had in the receivership. Neither is the petition made for the purpose of delaying the proceedings or "to create a maneuvering value in their bonds". It has for its sole purpose the protection of

the clear rights of all Manhattan Second Mortgage bondholders.

A criticism of the pleading incorporated in the petition was voiced upon the argument of the application to the effect that petitioners had adopted a pleading the effect of which was to cut off all their interest in the receivership estates. The pleading referred to is the bill of foreclosure of the Trustee of the Manhattan First Mortgage. The petition clearly limits the adoption of that pleading to the common purpose expressed therein and asserted in the petition to compel affirmance of the lease and the curing of the defaults on the first mortgage. It is submitted that petition sets forth "a short and plain statement of the claim showing that the pleader is entitled to relief, and a demand for judgment for the relief to which he deems himself entitled" as required by the rules.

Several of the parties to these proceedings filed answers to the petition and urged as one of the chief reasons for denial of intervention that petitioners are already adequately represented. It is to be noted, however, that the parties claimed to be adequately representing the petitioners filed no answers and made no such claim and thus assumed no responsibility for the urging of the claims set forth in the petition. Where the facts as to inaction on the part of the Trustee and the Receiver with reference to the said issues are well known to the Court and are apparent in the record it should not be necessary to show collusion, fraud, or other misfeasance in order to further demonstrate the inadequacy of the petitioners' representation.

It would serve no useful purpose to cite precedents as to the right to intervention since each case must be decided upon its own facts and it would be difficult indeed to find a case in which the facts parallel those in this case. There

have been only two or three decisions on this point under the new rules and none of them has any similarity to this case. It is submitted, however, that one of the purposes of the new rules was to broaden the right to intervene and generally to cut away the grounds for the long existing criticism of federal receiverships. Such criticism was well summarized in a recent note in the *Yale Law Journal, Vol. 47, Page 746 (March 1938)* to the following effect:

> "The Equity receivership inaugurated as an extraordinary remedy for corporations unable to pay their debts as they mature has long been criticized as an effective vehicle for the machinations of dominant banker-management groups. Assisted by such carefully secured aids as a friendly court, a few obliging creditors, and puppet protective committees, these groups have succeeded in maneuvering the most complicated corporate structures through the intricacies of the modern reorganization, often with little or no concern for the interests of investors at large. Nor have the receivership courts exhibited any marked inclination to insist upon the protection of minority rights, for the very complexity of the plans commonly presented for review has militated against any thoroughgoing analysis of the issues at stake. Pressed by the exigencies of judicial business and conscious of the practical necessity of consummating some sort of reorganization, the lower courts, at least, have tended to stamp with their approval any plan which could obtain the requisite number of consents and which promised an end to tedious litigation."

It would seem clear clear that one of the purposes of Rule 24 is to break the hold of "puppet protective committees" upon receiverships and permit the "investors at

large" to be heard. In a report growing out of an investigation by the Securities and Exchange Commission into the question of the extent and adequacy of representation by trustees in receiverships the following conclusion was given:

> *Report of the Counsel to the Special Committee, 74th Cong., 2d Sess. Sen. Doc. No. 268 (1936) (McAdoo Committee) 27:*
>
> "The obvious result of discouraging intervention and shifting objection is to weld the circle of collusion that surrounds the judge."

It is submitted that another of the purposes of Rule 24 is, and rightly should be, to forestall this welding process.

With reference to the measure of representation of bondholders' interests by trustees it has been well, and so far as these proceedings are concerned prophetically said "the so called corporate trustee has most often been distinguished by its inactivity, which, whether it is justifiable inactivity or not, should not stand as a barrier against the admittance of the secured creditors into the proceedings". (47 Yale Law Journal, 898, *Moore* v. *Levi* on Federal Intervention.)

CONCLUSION

Petitioners should be granted intervention of right to represent all Manhattan Second Mortgage Bondholders who care to join them for the following purposes:

1. To be heard upon the submission of the "Plan of Unification" for the approval of the Court and upon any proceeding to fix an upset price.

2. For the purpose of taking such action as may be necessary to compel affirmance by the Interborough Receiver of the Manhattan lease and compelling the making of payments required by the lease.

3. To put in issue the question of the validity of the Interborough bonds pledged to secure Interborough's 7% notes in order to preserve Interborough's estate and recover for that estate interest payments on those bonds heretofore conditionally authorized by the Court in the total amount of over $17,000,000.00.

Respectfully submitted,

ROBERT E. CONNOLLEY, Esq.
Attorney for Petitioners
Office & P. O. Address
36 West 44th Street
Borough of Manhattan
City of New York